United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1430

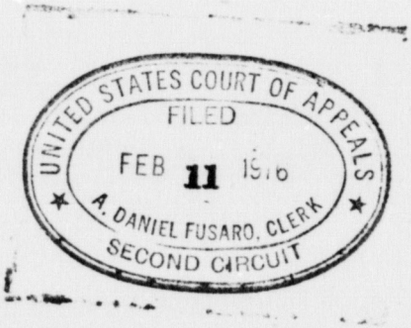
To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- JAMES GRANT, Defendant-Appellant.	Docket No. 75-1430

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JAMES GRANT
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

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QUESTIONS PRESENTED

1. Whether the Government failed to prove beyond a reasonable doubt that appellant used the guns to commit a crime.

2. Whether the Government failed to prove beyond a reasonable doubt that appellant had constructive possession of the drugs found in Room II and Room IV.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles M. Metzner) rendered on October 15, 1975, after trial before a jury, convicting appellant James Grant of one count of possession of cocaine (Count One), three counts of possession of cocaine with intent to distribute (Counts Two, Three, and Four), and five counts of using a firearm in the commission of a felony (Counts Six, Seven, Eight, Nine, and Ten) (21 U.S.C. §§812, 841(a)(1)(b); 18 U.S.C. §924(c)(1)), and sentencing him to concurrent terms of imprisonment of two and one-half years on each of Counts Two, Three, and Four; six months' imprisonment on Count One, to run concurrently with the sentences imposed on Counts Two, Three, and Four; and terms of imprisonment of two and one-half years on Counts Six, Seven, Eight, Nine, and Ten, to run concurrently with each other and with the sentence imposed on the other counts of which appellant was convicted. In addition, pursuant to 18 U.S.C. §841, appellant was sentenced to a term of three years' special parole on Counts Two, Three, and Four, such terms to run concurrently with each other and to commence following completion of the term of imprisonment.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The Piggy Back Social Club was located on the second floor at 1-9 162nd Street, Bronx, New York (12-13*). The second floor had at least two corridors with closed doors leading off each (15). Some of the doors were numbered and others unnumbered. As relevant here, they were numbered "Room I," "Room II," "Room IV," "Room V," and one unnumbered room. "Room V" was the main room of the club (94).**

On January 22, 1975, at about 10:30 a.m. (129), agents of the Drug Enforcement Agency ("DEA") and the Bureau of Alcohol, Tobacco, and Firearms, with New York City policemen, entered the building and walked upstairs (12-13). They met three black men in the hallway (13, 64, 134-135). Appellant approached from the end of the corridor (18).

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*Numerals in parentheses refer to pages of the trial transcript.

**When the agents arrived there were a large number of people in Room V (59, 94). The door was locked, and the agents did not go in (100). At about 12:30 p.m., the agents entered the room and asked everyone to leave (94, 129). Cursory searches were made as the people left Room V (96). No drugs were found in the room or on the persons who had been inside it.

In response to an inquiry, appellant told the agents that he was the manager of the club and that his name was James Grant (18, 69, 135).*

The agents falsely stated to appellant that they were looking for a fugitive, and showed appellant a photograph of a person. They told appellant there was nothing for him to be alarmed about, and that they wanted to ask him a few questions. Appellant said he did not recognize the subject of the photograph. The agents asked if there was an office where they could go and talk. Appellant led them to a door on which was written "Jay Mod I." Appellant opened the door with his keys, and they all went in (19, 135, 152).

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*The agents investigated and learned the names of about six people (99) who might have been owners of the club (98). A man named Courtland Samples was one of those whose name came up as a possible owner (98). Counsel requested permission to see any information collected by the Government on the question of ownership, but Judge Metzner denied the motion as counsel was explaining why such information was necessary.

One of the agents then informed appellant that they had a search warrant for Room I (20, 135).*

Appellant sat down on a chair in the room. As he did so the agents saw in his pocket a cellophane bag containing white powder (Exhibit #1) (20, 27, 74). In response to an inquiry, appellant said, "It's cocaine for my own use" (20, 74). Appellant was arrested (21, 75), advised of his rights (22, 75), and searched (76). No weapons were found on his person (76). In response to an inquiry, appellant said the room was his office and that he lived in a back room of the office, sleeping on a couch located there (23, 136, 154).

A search was conducted of Room I, the back room, and appellant. Found on appellant's person was .08 grams of cocaine and sugar (285) (Exhibit #20 (31)). Found in the room were the following items:

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*Prior to trial a motion was made to suppress the evidence on the ground that the affidavit used to obtain the warrant was insufficient and that the warrant was executed by deliberate and intentional fraud. The motion was denied in an opinion (Supplemental Record on Appeal, Document # As to the issue of the entry by ruse, the District Court stated:

> While the question has not been definitively answered by the Supreme Court, the clear implication of Sabbath v. United States, 391 U.S. 585 (1968), is that some force, however slight, is necessary to bring §3109 into play. The circuits have uniformly held: that a ruse does not amount to the use of force.

A package containing .14 grams of marijuana (285) found in a desk drawer (32) (Exhibit #21 (31));

A package containing .34 grams of sugar (285) found in a desk drawer (Exhibit #22 (32));

A shopping bag (33) found in a closet containing three packages of phenylpropanolamine hydrochloride (285) (Exhibits #32, #24, #25 (32-33));

A package containing boric acid (286) taken from a desk drawer (Exhibit #26 (33);

A package containing 155.31 grams of phenylpropanelamine hydrochloride seized from a television receiver (Exhibit #19 (35)); and

A package containing 3.03 grams of cocaine, hydrocaine, and sugar (284) found in a desk drawer (Exhibit #2 (27-28)).

In the search of the room the agents found five loaded guns, including a semi-automatic carbine wrapped in a towel or blanket located behind the couch (137-138), discovered only after the couch had been pulled out (157); a rifle found under the cushions of the couch; a Magnum revolver found in a locked (158) steel credenza (139) which the agents forced open (158); an automatic pistol found in a locked desk drawer (159, 139) which the agents also forced open (159); and a Magnum revolver found in a desk drawer (142). All the items, including the guns, found in these two rooms were out of sight -- in drawers or closets or under couches (85). During the search, appellant was seated and handcuffed (86).

Appellant was taken from the club at about 3:00 p.m. (128), and was charged in a complaint with possession of drugs and, as a drug user, with unlawfully receiving firearms transported in interstate commerce (18 U.S.C. §922(h)(3)) (Supplemental Record on Appeal, Document #).*

During the earlier search of Room I, the agents had seen a hole in a wall panel. Peering through the hole, the agents looked into another room and saw bags and a strainer on a desk in that room (38-39, 161-162). The agents obtained a search warrant for Room II and, later in the evening (100), entered that room, using appellant's keys (40, 111, 140-141) (Exhibit #54). In that room the agents found packages containing small quantities of diluted drugs,** others containing drug dilutants,*** and drug packaging equipment.****

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*Appellant was initially charged (75 Cr. 133) with possession of cocaine with intent to distribute. A superseding indictment (75 Cr. 400) charged one count of possession of cocaine and using and illegally carrying firearms. A second superseding indictment, the one underlying this trial, broke the narcotics count into five charges, and charged only the carrying, and not the illegal use of, a weapon.

**Exhibit #3 (desk drawer) (41, 284); Exhibit #4 (desk drawer) (42, 44, 284); Exhibit #27 (desk drawer) (42).

***Exhibit #29 (desk drawer) (43, 44, 286).

****Exhibit #38, a strainer (43).

Later that night (113) another room in back of the club near the kitchen (unnumbered) (113) was also searched (45). One of two locks on the door was opened by an employee of the club (116), Ronald Brown (46, 113, 116), who had a key to the front door of the club (114) and had previously lived there (116). Brown then pushed the door open (46, 117). In that room the agents found bags containing cocaine mixed with dilutants (284) (Exhibits #5, #6, #7); marijuana (286) (Exhibits #30, #31) (47, 51); dilutants (52, 214, 284) (Exhibits #33, 34, 36, 37); a tray of objects used to cut narcotics (Exhibits #45, #45A-E); and a scale (47, 119-120).

There was also a bedroom off the front room (121) containing a bed, a television set, and some of Mr. Brown's clothing (120).

A man named Taylor, possessing a Beretta pistol, was arrested later that evening at about 9:00 p.m. while the agents were searching at the entrance to Room I (122). Mr. Taylor also carried ammunition which fit some of the guns the agents had seized earlier in the day from Room I (124).

Later the agents entered another room, Room IV, using appellant's keys (48). There they found bags (see 193) containing small amounts of diluted cocaine (285) (Exhibits #8-13) (176-177, 190, 192, 193) and others containing marijuana and dilutants (Exhibits #43, #44) (198, 262).

At the conclusion of the Government's case, defense counsel made a motion to dismiss Counts Three, Four, and

Five, on the ground that there was no evidence to show that appellant possessed the drugs found in Room II, in the back room near the kitchen, or Room IV (269) (see 270-271).* In response, the Government argued that there was evidence to show constructive possession, and the motion was denied (272).

Defense counsel also argued that Counts Six through Ten of the indictment should be dismissed because the Government had made no showing that the guns were used during the course of another crime (273). The District Court denied the motion, stating that, since the guns could have been introduced as evidence even if a defendant were charged only with possession of drugs, they could be the basis of a separate charge of "use" (277).** The motion was denied (280-282).***

In his charge,**** Judge Metzner instructed the jurors on the issue of constructive possession:

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*These locations were keyed to Counts Three, Four, and Five. During the trial, counsel had objected to the admission of the evidence coming from these locations because of lack of proof of connection with appellant (224, 259, 261).

**The pages of the transcript reflecting the colloquy on the motions to dismiss are D to appellant's separate appendix (269-282).

***The Judge stated:

> I think it is close, but if by any chance your client is convicted, you have a clear appellate issue and they are going to have to determine it.
>
> (281).

****The text of the complete charge is C to appellant's separate appendix.

> The word "possession" as used here means not only physical possession in the sense of holding an object in one's hand or having it on one's person. The defendant may also be found to have possession of cocaine if you are convinced beyond a reasonable doubt that he had power to control its movements or distribution. This is what the law terms constructive possession.[*]
>
> You may find that the defendant has constructive possession of cocaine if he is sufficiently associated with the persons or things having physical custody of it so that it is able without difficulty to be produced for a customer.
>
> However, mere presence in an area where narcotics are discovered is not sufficient in itself for finding possession. The key to possession is dominion and control over the cocaine.
>
> (356).

The District Judge also instructed the jurors on "use" of the weapons:

> As to each of these counts, the government must prove two elements beyond a reasonable doubt.
>
> The first element is that the firearm specified in the count must have been used by the defendant in some manner to enable him to commit the crime of possessing cocaine with intent to distribute it.
>
> ....
>
> Now, as to the first element, the defendant must have used the firearm alleged

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*After conclusion of the charge, counsel objected to the Judge's defining "constructive possession." The Court overruled the objection, stating that he did not base possession on access, but that "the key was dominion and control" (367).

> in the count. When I say "used," I do not imply that the firearm had to be fired or even necessarily carried but only that the defendant had the firearm to further the commission of the crime of possessing cocaine with intent to distribute it. In this connection, you may infer, if you wish, that the firearms were used to aid the defendant in his possession of the cocaine with intent to distribute.
>
> As I have said, you may draw this inference to satisfy this element of the crime. However, if you decide not to draw the inference, then you should acquit the defendant on these counts.
>
> (358-359).

After deliberations, the jury found appellant guilty of possession of cocaine (Count One), possession with intent to distribute (Counts Three and Four), and use of a weapon (Counts Six through Ten). Appellant was acquitted of Count Five.

Concurrent sentences of two and one-half years in custody were imposed on all counts but Count One. On Count One, appellant received a six-month concurrent sentence. At sentencing, the Judge stated:

> Mr. Grant, I don't see how I can avoid imposing a sentence here because of what I consider a large amount of guns found at this time, something you didn't mention, Mr. Mogulescu.
>
> According to the conviction by the jury, Mr. Grant had in his possession with intent to distribute a half a kilogram of cocaine. He also had in his possession five different guns. That's an arsenal. That is not just a single gun; it's an arsenal. A Dan Wesson .357 Magnum revolver, a Winchester .30-.30 caliber rifle, a Remington .45 caliber semiautomatic pistol, a Plainfield .30 caliber semiautomatic rifle and a Sturm Ruger

.357 Magnum revolver.

As I recall the testimony, one was found beneath the bed in which he slept all week and one was found under the pillows of the bed on which he slept all week, which I assum he knew of because he must have taken the pillows off in order to sleep.

This is the thing that bothers me. Guns kill.

(387).

ARGUMENT

Point I

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT "USED" THE GUNS TO COMMIT A CRIME.

I

Counts Six through Ten of the indictment charge a violation of 18 U.S.C. §924(c)(2):

> Whoever uses a firearm to commit any felony for which he may be prosecuted in a court of the United States ... shall ... be sentenced....

The Government claimed that the mere hidden presence of the guns in Room I constituted the requisite use of them to commit the underlying Federal felony, possession of cocaine with intent to sell. The legislative history of the statute, however, demonstrates that the facts here are not sufficient to establish "use" and that the Government failed to prove that element of the crime beyond a reasonable doubt. United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); United States v. Ramirez, 482 F.2d 807, 813 (2d Cir. 1973):

As Ramirez makes clear:

> Section 924(c) was enacted by Congress as part of the Gun Control Act of 1968, Pub.L. 90-618, 82 Stat. 1224. This section creates a separate crime, rather than merely providing an additional penalty. United States v. Vigil, 458 F.2d 385 (10th Cir. 1972); United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972); 114 Cong.Rec. (Part 17 11121) (1968) (Remarks of Representative Poff).

The section, as originally proposed in H.R. 17735 (90th Cong., 2d Sess.), provided for the forfeiture of any firearm or ammunition "involved in, or used or intended to be used in" a Federal felony. The Senate bill, S.3633 (90th Cong., 2d Sess.), provided for forfeiture of any weapon if involved in a violation of the firearms statute. See United States v. Ramirez, supra, 482 F.2d at 807.

After the House bill was introduced and referred to the Committee on the Judiciary, 114 Cong.Rec. (Part 13) 16478 (June 10, 1968), numerous amendments to the forfeiture section were proposed and submitted to the Committee. The bills are easily divisible into two categories: those which penalized the use of a firearm transported in interstate commerce in the commission of or in connection with certain specifically named crimes;* and those which punished the possession of a firearm during the commission of specifically enumerated felonies.** Thus, at this early stage in deliberations of what was to become §924(c), the Congress separated two concepts: possession while a crime was in progress, and use to commit the crime. The mere intent to use the weapon, as found in H.R. 17735, was omitted from consideration.

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*H.R. 17905; H.R. 17994; H.R. 18026; H.R. 18298; H.R. 18332; H.R. 18403; H.R. 18499

**H.R. 18375; H.R. 18402; H.R. 18462; H.R. 18287; H.R. 18462; H.R. 18370; H.R. 18655.

Representative Casey expressed the generally held view that the many violent crimes committed with firearms required separate punishment for the use of a gun in the commission of a crime. 114 Cong.Rec. 21781. The Casey Amendment (H.R. 6137) was introduced stating that whoever, during the commission of any robbery, assault, murder, rape, burglary, kidnapping, or homicide uses or carries any firearm which has been transported in interstate commerce shall be punished. 114 Cong. Rec. 21788.

Other members of the House expressed concern about the effect of the bill on those licensed to carry a weapon who might become involved in assaults while carrying their weapon. Their statements made clear that they viewed use as a positive, aggressive act, and carrying as simply having a gun simultaneously with the criminal conduct. Thus, Representative Yates inquired whether a policeman, although properly carrying a gun on his hip, who slaps someone without using his firearm, could be punished under the statute. Representative Scheuer asked

> for clarification of how this bill would affect legitimate licensees. I have a pistol permit, issued by the New York City police department. If I am convicted of assault -- If I push somebody in the street or punch somebody in the nose -- with no use of the pistol, but merely carrying the pistol as I am licensed to do -- in no way bringing the pistol into any aggressive act, am I going to suffer this kind of grievous penalty?...
>
> Would it apply to police officers who

> are convicted of an assault, without the use of their weapon, while carrying a weapon as they are required to do on duty in most jurisdictions?
>
> (114 Cong.Rec. 21788).

These inquiries made clear that the critical focus of "use" of a gun was an aggressive action which was part of the crime. Significantly, in a later discussion on the Casey amendment, it was proposed to strike the word "carries" so that the provision would apply "only to those who actually use a gun in the commission of the offenses enumerated." 114 Cong.Rec. 22230.

Representative Poff then offered his amendment. That amendment became the provision which, after further debate, was ultimately enacted as §924(c). It separated, thereby clearly differentiating between, carrying and using a weapon. Further, the provision required that the using be "to commit" the crime, but the carrying need not be part of the crime, but only must occur during the offense. The carrying, however, was made punishable only if possession of the weapon itself was illegal (see United States v. Ramirez, supra), whereas use of the weapon to commit a crime, even by a legal possessor, was to be penalized.*

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*The provision limited the underlying crimes to Federal felonies, rather than including specific crimes punished by state laws. This was to overcome the fear, expressed by many Congressmen, that the statute was unconstitutional and that, even if constitutional, it expanded Federal criminal jurisdiction beyond proper and manageable scope.

In the continued debate as to whether to adopt the Casey or the Poff amendment, it was made clear that use meant something substantially more than mere possession or carrying. Thus, the earlier suggestion that "carrying" be stricken from the Casey amendment was made part of the Dowdy amendment:

> I believe that the onus should be the use of a firearm in the commission of a crime. The fact that a person might be carrying a firearm could very well have nothing to do with the commission of a crime if the gun is not used or exhibited. Of course, exhibiting would be using the gun in the commission of a crime, and that is where the burden should be on the use of a gun in the commission of a crime.
>
> It has been suggested in the general debate that a policeman, having a perfect right to have a gun, might come under the provisions of the Casey amendment, or a person who has a license to carry a gun with him, and though he did not use it, if he got involved in a fracas, might come under the burden of this bill because he had been carrying a gun, though it would not have anything to do with the commission of an offense he might commit.
>
> (114 Cong.Rec. 22235).

The House voted in favor of eliminating all "carrying" from the Casey amendment (114 Cong.Rec. 22237). Consistent with that position, the House defeated a proposal to eliminate from the Poff amendment the word "illegal" as a modifier of carrying. 114 Cong.Rec. 22236, 22245. In contrast with this attitude of placing a limitation on punishing carrying is the clear intent to punish affirmative use. As Representative Hall stated:

> When a person commits a crime with a firearm, he uses his weapon to terrorize his victim with the threat that with the flick of his finger he can snuff out one or more innocent lives. Even where the crime does not result in death or injury, the use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or weapons effective only at a very short range. The "equalizer" as it has been called, is a tool of terror, death or injury in the hands of a criminal. He who stoops to point its barrel at an innocent victim, for money, for revenge, for kicks, or for any other purpose, deserves to be singled out by the laws as the worst kind of social menace.
>
> (114 Cong.Rec. 22247).

The Poff amendment was then adopted. 114 Cong.Rec. 22248.

What Congress was unmistakably saying is that, while carrying a firearm was to be punished in some instances, carrying was not so serious as actually using a weapon to commit a crime because, in the latter situation, the danger of injury or death was substantially greater. This history unmistakably requires the conclusion that "use" be given its normal meaning -- "to put or bring into action or service; to employ for or apply to a given purpose." Webster's Unabridged Dictionary (2d ed. 1970).* By the very language of §924(c), the Government must prove beyond a reasonable doubt that the guns were applied to the purpose of committing a crime, here, possession of drugs with intent to sell. Defense counsel was quite right

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*The Assistant U.S. Attorney's statement to the District Judge that the legislative history is not helpful (274),is simply disingenuous.

when he sought an acquittal because there was no such proof here. See United States v. Maze, 414 U.S. 40 (1974).

It was asserted that appellant constructively possessed cocaine found in the several rooms of the club, as well as actually possessing the small amount found in his pocket. However, there was no evidence that the five guns found had at any time actually been employed to effect this possession.

In the search conducted at the time of the arrest, the guns were found in the small room adjoining Room I: one wrapped in a blanket or towel behind a couch; one beneath the couch cushions; one in a desk drawer; one in a locked desk drawer; and one in a locked credenza. All the guns were hidden from view. None was immediately accessible to appellant as he met the agents in the corridor, as he entered Room I, or as he sat handcuffed in the agents' presence. Further, there is no evidence that the guns were ever employed -- exhibited, drawn, pointed, fired -- in any period of possession of drugs, to aid that possession, or to aid intended sales. As counsel said:

> ... The weapons didn't facilitate the possession, the weapons were not used for the possession, the possession is entirely separate.
>
> (276).

The Government failed in its burden of proof because what the Congress has chosen to penalize is the active use as distinguished from possible, potential, anticipated, expected,

future, or even likely, use. This burden is not different from the Government's burden of proof with respect to other crimes. Robbery, assault, possession -- each requires proof of the prohibited act and not some future possibility.* Hidden presence of the guns with no use of them and without proof of prior use did not provide more than possibility of use, and thus was not sufficient. Proof of possession of guns is not the active use described in the legislative history and intended by Congress to be covered by the statute. Indeed, the presence of the "carrying" subsection demonstrates conclusively that inactive possession is not to be considered use. To deem it otherwise would be to render the "carrying" subsection largely superfluous, contrary to setteled principles of statutory construction. See United States v. Bass, 404 U.S. 336 (1971).

II

Judge Metzner denied defense counsel's motion to acquit because of failure to prove beyond a reasonable doubt use of the guns. He based this ruling on his conclusionthat, since under the rules of evidence, possession of a gun is admissible to prove elements of some other crime, evidence of possession is always relevant to prove use of a gun. Thus, concluded Judge

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*Even attempt is not punishable under Federal law unless specifically included in the statutory provision. United States v. Padella, 374 F.2d 782, 787 n.6 (2d Cir. 1967).

Metzner, proof of possession of a gun is sufficient to establish beyond a reasonable doubt use of a gun to commit another crime. This equation, however, is not correct.

Evidence of possession of a gun is admissible if relevant to aid in proving some aspect of another crime charged. However, although proof of possession of a gun may be relevant to proving use of the gun to commit another crime, as trial counsel tried to point out to the Judge, the evidence of possession may also be relevant to show circumstances other than actual use of the gun. Further, proof of possession of the gun may not be sufficient to prove actual use beyond a reasonable doubt.

As part of the circumstances of a crime, the evidence may well be relevant to prove a state of mind, an intent, an expectation, a future possibility that makes it more likely that the underlying crime has occurred or that the defendant had the knowledge required for commission of the underlying crime. However, proof of possession does not necessarily prove that the state of mind has produced conduct, that the intent has been fulfilled, or that the expectation or possibility has occurred. Thus, in United States v. Cannon, 472 F.2d 144 (9th Cir. 1972), cited by Judge Metzner, that Court said of a defendant who was armed at the time he possessed drugs with intent to distribute:

> It may reasonably be inferred that an armed possessor of drugs has something more in mind than mere personal use.

The quoted portion explains why evidence of possession of the weapon is relevant, and therefore admissible to show an intent to distribute drugs. However, from mere possession it cannot be inferred that the gun has been used to protect or aid a sale. For the same reason, Judge Metzner's reliance on United States v. Ravich, 421 F.2d 1196, 1204 (2d Cir.), cert. denied, 400 U.S. 834 (1970), is misplaced. Ravich held only that evidence of possession of guns is admissible to assist in showing likelihood of possession at an earlier time, that the defendants had the opportunity to get guns, and thus that they were bank robbers. However, use of the gun at the time of the crime was not proven by the possession, but by other evidence in the case which showed use -- the testimony of five bank employees that men armed with pistols and a shotgun entered the bank.

Reliance on United States v. Mallah, 503 F.2d 971, 981 (2d Cir. 1974), is likewise misplaced. The possession of thermometers was found to be relevant to a state of mind -- intent to conspire to distribute narcotics. This Court said that the jury could find the thermometers useful to the defendants in their distribution, and therefore of the agreement to distribute the drugs. However, there was no indication that the Court expected this possession to be proof of actual use of the thermometers. Further, if use of the thermometers was a crime, there is no indication that possessing them would establish use beyond a reasonable doubt.

The issue resolves into a basic principle that an act and an intent must merge for the commission of the crime. For guilt under §924(c) to be established beyond a reasonable doubt, the mere possibility of future use, or even the intent to use, is not enough. Thus, Judge Metzner's continued quotation from Cannon, that the gun

> ... is used to protect the possessor of drugs from being ripped off, it protects him in distributing his narcotics...,

must be taken in the context of the facts. The very question to be determined is not what might happen, but what did happen: Did the gun protect the possessor from being ripped off or in distributing his narcotics? The answer cannot be inferred from mere presence of a gun in places not easily available to appellant, without any other information about the drugs or how they were distributed. While possession may be relevant and admissible to proving use, on these facts possession alone will not prove use beyond a reasonable doubt.

III

Appellant received concurrent two and one-half year sentences on all eight counts.* However, it is apparent from the sentencing minutes that the Judge imposed the sentence he did because he believed appellant was using guns in a prohibited manner. Since no such conduct occurred and, in fact, there

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*On Count One, he received a six months sentence.

was no proof of the danger that someone might be killed or injured, the District Judge should reconsider the length of sentence. United States v. Rivera, 521 F.2d 125, 129 (2d Cir. 1975); United States v. Brown, 479 F.2d 1170, 1173 (2d Cir. 1973); McGee v. United States, 162 F.2d 243, 246 (2d Cir. 1972). Further, under the U.S. Board of Parole's crime severity chart (28 C.F.R. §2.20), since appellant's behavior involved "multiple separate offenses" of two different crimes, both classified as "very high," the length of appellant's commitment before release on parole may be substantially lengthened.

Point II

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT HAD CONSTRUCTIVE POSSESSION OF THE DRUGS FOUND IN ROOM II AND ROOM IV.

Appellant was charged with, and convicted of, possession of the drugs found in Room II and Room IV.* Since there was no proof of actual possession of those drugs, the Government's theory was that appellant had constructive possession. However, as defense counsel stated in his motion for acquittal, there is insufficient evidence to prove beyond a reasonable doubt that appellant had the requisite dominion and control over the drugs. Thus, the conviction for Counts Three and Four must be reversed. United States v. Taylor, supra, 464 F.2d 240.

In United States v. Febre, 425 F.2d 107 (2d Cir.), cert. denied, 400 U.S. 849 (1970), this Court affirmed its earlier holding that

> one having a working relationship or a sufficient association with those having physical custody of the drugs so as to enable him to assure their production, without difficulty, to a customer as a matter of course may be held to have constructive possession.
>
> Id., 425 F.2d at 111.

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*Appellant was acquitted of possession of the drugs found in the unnumbered room near the kitchen.

The Court noted that in all cases in which a finding of constructive possession had been upheld, the Government has proven that the defendant set the price for the drugs, had the final say with respect to the transfer, or was able to assure delivery. Ibid.; United States v. Infanti, 474 F.2d 522, 526 (2d Cir. 1973); United States v. Stewart, 451 F.2d 1203, 1207 (2d Cir. 1971).

In this case, there is no evidence with respect to any of these indicia of dominion and control. The record gives us no evidence of appellant's relationship to the drugs -- there is nothing to show he had anything to do with sale, distribution, or dilution of drugs. Indeed, although there were thirty to seventy people in Room V of the club when the agents arrived on January 22, no drugs were found in that room or in the possession of any of the people who left that room. It is not possible to assume that there was any distribution or sale.

Nor does the record show anything about a relationship between appellant and some other person who had physical custody or control of the drugs.

The only evidence presented was that appellant said he was the manager of the club and that he had keys to Room I, where he had an office and slept, and that the keys opened Rooms II and IV.

It is clear that mere presence on the premises does not create constructive possession of items found there. United

States v. Kearse, 444 F.2d 62 (2d Cir. 1971):

> Presence tells us nothing about what the defendant's specific function was and carries no letigimate, rational, or reasonable inference that he was engaged in one of the specialized functions connected with possession.
>
> Id., 444 F.2d at 64, quoting from United States v. Romano, 382 U.S. 136 (1965).

The record does not show that appellant was a lessee or owner of the club. Indeed, one of the agents stated on cross-examination that the identities of the owners were not yet known to the Government, although an investigation had been undertaken.

Further, there is no indication as to what appellant's responsibilities were as manager of the club, whether he had exclusive control of Rooms II and IV, or even whether Rooms II and IV were part of the club. Compare United States v. Casalinuovo, 350 F.2d 207 (2d Cir. 1975), where the record showed that the defendant was a janitor who had specific responsibilities in the basement room being searched, and was the only person who had access to the room. Without information about appellant's duties, it is not possible to know whether he could even remove the drugs from the room for delivery, to say nothing of setting the price for them.

Even though his keys opened the doors to those rooms, this evidence does not give us any further information about the relationship between appellant and the drugs or others connected with them.

The failure to prove dominion and control over the drugs found in Rooms II and IV beyond a reasonable doubt requires reversal of the conviction on Counts Three and Four of the indictment.

CONCLUSION

For the above-stated reasons, the judgment below must be reversed and Counts Two through Four dismissed; alternatively, the judgment on Counts Six through Ten must be reversed and the defendant remanded for resentence on the remainder of the counts.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JAMES GRANT
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLLIS SKLOOT BAMBERGER,
Of Counsel.

CERTIFICATE OF SERVICE

FEBRUARY 11, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.